RECORD AND BRIEFS

No. 16-1161

IN THE

Supreme Court of the United States

BEVERLY R. GILL, ET AL.,

Appellants,

v.

WILLIAM WHITFORD, ET AL.,

Appellees.

On Appeal from the United States District Court for the Western District of Wisconsin

BRIEF OF *AMICI CURIAE* HISTORIANS IN SUPPORT OF APPELLEES

CLIFFORD M. SLOAN
Counsel of Record
BRENDAN B. GANTS
SKADDEN, ARPS, SLATE,
MEAGHER & FLOM LLP
1440 New York Ave., NW
Washington, DC 20005
(202) 371-7000
cliff.sloan@skadden.com

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INTEREST OF *AMICI CURIAE*

Amici are historians with a scholarly interest in the origins and adoption of the Constitution, including a particular interest in the development and evolution of American ideas about political representation. *Amici* believe that a historical understanding of these ideas, and of the practice and perception of various forms of gerrymandering in American history, may assist the Court in its analysis of the legal issues presented in this case.[1] *Amici*, whose professional background and relevant publications are set forth in the Appendix, are:

Peter H. Argersinger, Professor of History, Southern Illinois University;

Carol Berkin, Presidential Professor of History, Emerita, Baruch College and the Graduate Center of the City University of New York;

Holly Brewer, Burke Professor of American History, University of Maryland;

John Brooke, Arts & Sciences Distinguished Professor of History and Director of the Center for Historical Research, Ohio State University;

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[1] Pursuant to Supreme Court Rule 37.6, counsel for *amici* certify that they authored this brief in its entirety and that no party or its counsel, nor any other person or entity other than amicus or its counsel, made a monetary contribution to this brief's preparation or submission. The parties have granted blanket consent to the filing of amicus briefs.

Saul Cornell, Paul and Diane Guenther Chair in American History, Fordham University;

Joanne B. Freeman, Professor of History and American Studies, Yale University;

Jonathan Gienapp, Assistant Professor of History, Stanford University;

Hendrik Hartog, Class of 1921 Bicentennial Professor in the History of American Law and Liberty and Director of the Program in American Studies, Princeton University;

Alexander Keyssar, Matthew W. Stirling, Jr. Professor of History and Social Policy, Harvard University;

James Kloppenberg, Charles Warren Professor of American History, Harvard University;

Gerald F. Leonard, Professor of Law and Law Alumni Scholar, Boston University School of Law;

Peter S. Onuf, Thomas Jefferson Memorial Foundation Professor Emeritus, University of Virginia;

Jack Rakove, William Robertson Coe Professor of History and American Studies, and Professor of Political Science, Stanford University;

John Fabian Witt, Allen H. Duffy Class of 1960 Professor of Law and Professor of History, Yale University; and

Rosemarie Zagarri, University Professor and Professor of History, George Mason University.

SUMMARY OF ARGUMENT

Among the central questions confronted by the Framers of our Constitution was how best to realize in the new American republic the idea of actual representation. Having rejected and cast off the British notion of "virtual representation," Americans demanded a close correspondence between the sovereign people and their legislative assemblies. Americans also were concerned that legislative factions might entrench themselves in power, similar to forms of corruption that prevailed in Parliament.

This bedrock American principle of actual representation not only permeated constitutional debates in the Founding era but also underlies the First Amendment, which the Framers viewed as essential to ensuring representatives' accountability to their constituents. The Fourteenth Amendment built on the Framers' vision by strengthening actual representation and extending it to the states.

Partisan gerrymanders are of two types: drawing districts of unequal population size and manipulating district lines for partisan ends. The use of either or both of these methods can create profound distortions and undemocratic entrenchment of one political group or party. Both types of gerrymanders have been employed at various times throughout American history – sometimes separately, sometimes in combination. From a historical perspective, both types of gerrymanders conflict with the vision of actual representation that was central to the Framers.

Contrary to some misconceptions, although partisan gerrymanders have occurred at various times, they never have been regarded as an acceptable feature of American democracy. Rather, consistently since its inception, partisan gerrymandering has been forcefully denounced as unconstitutional, as a form of corruption that threatens American democracy, and as an infringement on voters' rights. Even those who engaged in partisan gerrymandering have generally not defended the practice as sound or meritorious or democracy-enhancing; rather, the defense typically has been simply that the other party did it before or would do it if given the opportunity. In short, any claim that partisan gerrymandering has been regarded as an acceptable characteristic of our democratic system is demonstrably ahistorical.

Moreover, partisan gerrymandering as practiced today differs dramatically from the practice of prior eras in ways that significantly heighten the serious concerns that have long been raised about the potential impact of partisan gerrymandering on representative democracy in America.

ARGUMENT

I. THE FRAMERS EXPRESSED A VISION OF REPRESENTATIVE DEMOCRACY THAT REQUIRES A CLOSE CORRESPONDENCE BETWEEN THE VOTING PUBLIC AND ITS LEGISLATIVE ASSEMBLIES

A. The American Vision of Representative Democracy Has Been Based On a Legislature that Reflects the Body Politic and is Responsive to its Demands

The American Revolution was in no small part a rejection of the British theory of "virtual representation." The British theory held that those communities which sent no representatives to Parliament – including the American colonies – nevertheless were represented because members of the House of Commons were obliged to consider the greater good when legislating.[2] To the Founding generation, this idea was an obvious sham and an object of ridicule.[3] Americans, whose colonial assemblies generally extended representation to new communities as they were organized, believed

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[2] *See* JOHN PHILLIP REID, THE CONCEPT OF REPRESENTATION IN THE AGE OF THE AMERICAN REVOLUTION 50-62 (1989).

[3] *See, e.g.*, BERNARD BAILYN, THE IDEOLOGICAL ORIGINS OF THE AMERICAN REVOLUTION 167, 169 (1967) (virtual representation was met in the colonies "at once with flat and universal rejection, ultimately with derision"); EDMUND S. MORGAN, THE BIRTH OF THE REPUBLIC, 1763-89, 20, 24 (4th ed. 2013) (the colonists "roundly rejected" the idea).

instead in a system of actual representation.[4] In the emerging American vision of representative democracy,[5] legislative assemblies were meant to reflect the broader electorate and be responsive to its demands,[6] with the vote serving to bind representatives closely to their constituents.[7] While omissions from the electorate now seem glaring (*e.g.*, exclusions by race, gender, and economic circumstance), the core conception of a close correspondence between the electorate and the assembly was strong and dominant.

As the Revolutionary War began and colonists considered the adoption of new constitutions, influential publications expounded this vision of government. For example, in *Thoughts on*

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[4] REID, *supra*, at 128-36; BAILYN, *supra*, at 161-75.

[5] *See, e.g.*, BAILYN, *supra*, at 161 ("The question of representation was the first serious intellectual problem to come between England and the colonies.").

[6] *See* JACK N. RAKOVE, ORIGINAL MEANINGS: POLITICS AND IDEAS IN THE MAKING OF THE CONSTITUTION 204 (1996) (discussing the concept of the legislature as a "miniature" or "transcript" of society and its significance to ensuring representatives would be accountable to their constituents).

[7] *See, e.g.*, ROSEMARIE ZAGARRI, THE POLITICS OF SIZE 18 (1987) ("actual representation implied that the legislature should be a microcosm of the larger society – that legislators should reflect the particular needs, wishes, and desires of those who elected them"); GORDON S. WOOD, THE CREATION OF THE AMERICAN REPUBLIC 1776-1787, 182 (2d ed. 1998) (in actual representation "[t]he process of voting was not incidental to representation but was at the heart of it").

Government, John Adams wrote that a legislative assembly "should be in miniature, an exact portrait of the people at large. It should think, feel, reason, and act like them."[8] Thomas Paine likewise argued in *Common Sense* that the legislature should act "in the same manner as the whole body [of the people] would [act] were they present."[9]

In a system of actual representation, of course, this vision of a representative assembly as a reflection of the body politic is achievable only if each component part is entitled to fair and equal representation. For example, Theophilus Parsons argued in *The Essex Result* that "[t]he rights of representation should be so equally and impartially distributed" that the representatives "should be an exact miniature of their constituents," that is of "the whole body politic, with all its property, rights, and privileges, reduced to a small scale, every part being diminished in just proportion."[10]

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[8] John Adams, *Thoughts on Government* (1776), *in* I AMERICAN POLITICAL WRITING DURING THE FOUNDING ERA: 1760-1805, 401, 403 (Charles S. Hyneman & Donald Lutz eds., 1983).

[9] Thomas Paine, *Common Sense*, *in* TRACTS OF THE AMERICAN REVOLUTION 400, 404 (Merrill Jensen ed. 1967).

[10] Theophilus Parsons, *The Essex Result* (1778), *in* I AMERICAN POLITICAL WRITING DURING THE FOUNDING ERA: 1760-1805, 479, 497. To be sure, the Founding generation debated what was the relevant unit of democracy – whether equality should be defined on the basis of individual voters (as in the modern one-person, one-vote standard), or by community, or based on taxation. *See, e.g.*, MARC KRUMAN, BETWEEN AUTHORITY AND LIBERTY: STATE CONSTITUTION MAKING IN *(cont'd)*

This vision of representation featured prominently in the Constitutional Convention. James Wilson declared, for example, that "[r]epresentation is made necessary only because it is impossible for the people to act collectively," and a Legislature being necessary for this purpose, it "ought to be the most exact transcript of the whole Society."[11] Anti-Federalists agreed. George Mason, for instance, argued that "[t]he requisites in actual representation are that the Reps. should sympathize with their constituents; shd. think as they think, & feel as they feel."[12]

This vision of representation also was central to the public debates regarding ratification of the Constitution. Although competing advocates disputed whether the new Congress could effectively function as a "miniature" of the body politic, the conception of a close correspondence between the electorate and the assembly was common ground that framed the debate. In response to anti-Federalist arguments that Congress would be too small to provide "a full and equal representation of

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(cont'd from previous page)

REVOLUTIONARY AMERICA 65-76 (1997); ZAGARRI, *supra*, at 36-60; WOOD, *supra*, at 170-72. But the fundamental principle that equal representation was necessary to ensure that the legislature actually represented the diverse needs and views of the body politic commanded widespread adherence.

[11] THE RECORDS OF THE FEDERAL CONVENTION OF 1787, 132-33 (Max Farrand ed., 1911) ("RECORDS").

[12] *Id.* at 133-34.

the people,"[13] Federalists emphasized their agreement that a republican government must "be derived from the great body of the society" and must be kept "in dependence on the people,"[14] and pointed to the fact that representation would be proportional to population in the House of Representatives.[15] As a result, they argued, the new government would not allow the abuses of power in the British system, where factions were able to unjustly entrench electoral power.[16]

The Framers' vision of representative democracy centered on actual representation has long been reflected in this Court's jurisprudence. *See, e.g., Reynolds v. Sims*, 377 U.S. 533, 565 (1964) ("legislatures . . . should be bodies which are collectively responsive to the popular will"); *id.* ("the Constitution demands[] no less" than "that each citizen have *an equally effective voice* in the election of members of his state legislature") (emphasis added); *see also, e.g., Vieth v. Jubelirer*, 541 U.S. 267, 307 (2004) (Kennedy, J., concurring in the judgment) ("The object of districting is to establish 'fair and effective representation for all citizens.'" (quoting *Reynolds*, 371 U.S. at 565-68)).

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[13] Melancton Smith, *Letters from the Federal Farmer, in* II COMPLETE ANTI-FEDERALIST 230, 230 (H. Storing ed., 1981).

[14] THE FEDERALIST NOS. 37, 39 (James Madison).

[15] *See* ZAGARRI, *supra*, at 102.

[16] *See id.*

B. The Framers Rejected "Corruption" of Representation in the British System and Sought to Prevent Similar Undemocratic Entrenchment By Factions in the American System

The Framers were deeply concerned by the various forms of "corruption" that effectively defeated equal representation in Parliament.[17] As this Court has noted, the delegates to the Constitutional Convention

> were quite aware of what Madison called the 'vicious representation' in Great Britain, whereby 'rotten boroughs' with few inhabitants were represented in Parliament on or almost on a par with cities of greater population. Wilson urged that people must be represented as individuals, so that America would escape the evils of the English system under which one man could send two members of Parliament to represent the borough of Old Sarum while London's million people sent but four.

Wesberry v. Sanders, 376 U.S. 1, 14-15 (1964). Americans also knew that "pocket boroughs," with small numbers of voters easily controlled by a

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[17] *See, e.g.*, RAKOVE, *supra*, at 208-12.

dominant interest or aristocrat, were another tool the Crown used to defeat actual representation.[18]

To the Founding generation, the corruption in the parliamentary system was not merely an issue of numbers and suboptimal representation. Rather, it was central to the experience of unjust subjugation that led to the Revolutionary War.[19] The Framers believed that the legitimacy of governments created in the wake of that war depended on protecting the system of representation from such entrenched interests. Edmund Randolph warned the Constitutional Convention, "[i]f a fair representation of the people be not secured, the injustice of the Govt. will shake to its foundations."[20] Against a proposal that the established Eastern states be entitled to a majority in the House of Representatives even after the rapidly growing Western territories entered the Union, George Mason warned that such "degrading discriminations" would not be tolerated and would risk a revolt.[21]

The Framers also knew the danger to fair and equal representation that legislative factions could pose if they were able to entrench themselves in

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[18] *See, e.g.*, KIRSTEN OLSEN, DAILY LIFE IN 18TH-CENTURY ENGLAND 7 (1999).

[19] *See, e.g.*, WOOD, *supra*, at 166; BAILYN, *supra*, at 323.

[20] RECORDS at 580.

[21] *Id.* at 578-79.

power regardless of the shifting views of the public. Madison identified England's boroughs as a "striking example" among others of inequitable governments in which a faction was able to block reforms that might dislodge it from its disproportionate and undemocratic power.[22] Preserving representational equality came to be seen as the most important safeguard against such entrenchment.[23] John Adams argued in *Thoughts on Government* that, to prevent "the unfair, partial, and corrupt elections" of the English system, "equal interests among the people should have equal interests" in the legislatures.[24] In response to similar concerns, several states included in their constitutions plans for periodic adjustments of representation.[25] Several states also adopted some form of a declaration "[t]hat the right in the people to participate in the Legislature, is the foundation of liberty and of all free government, and for this end all elections ought to be free and frequent."[26]

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[22] *Id.* at 584.

[23] *See* WOOD, *supra*, at 170.

[24] *Id.* (quoting Adams, *supra*, at 403).

[25] *See id.* at 172 (noting adoption of such provisions in New Jersey, Pennsylvania, New York, Vermont, and South Carolina).

[26] *See* DECLARATION OF RIGHTS § 6 (DE. 1776); MD. CONST. art. V (1776); N.H. CONST. arts. 10, 11 (1784); PA. CONST. arts. IV, VII (1776); N.Y. CONST. art. II (1777); DECLARATION OF RIGHTS arts. V, VI (VA. 1776).

At the federal level, concerns about entrenchment played a prominent role in the Constitutional Convention. Edmund Randolph, who introduced the Census Clause (Art. I, sec. 2, cl. 3), argued that it was necessary because the initial apportionment of representatives "placed the power in the hands . . . which could not always be entitled to it," and "this power would not be voluntarily renounced."[27] George Mason pointedly observed that, without the Clause, "the Legislature would cease to be the Representatives of the people": if the Legislature was not constrained to redistribute representation in the future so that a majority of the people could elect a majority of the Legislature, then "the power wd be in the hands of the minority, and would never be yielded to the majority,"[28] which would "complain from generation to generation without redress."[29]

Debates about the relationship between the states and the federal government also frequently highlighted fears that legislative factions on the state or federal level, or both, would use election laws to entrench their power. For example, Madison argued for the Elections Clause (Art. I, sec. 4, cl. 1) on the ground that Congress needed a mechanism to protect its own republican character from state legislatures: they might abuse their discretionary power to conduct elections in a myriad of ways

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[27] RECORDS at 579.

[28] *Id.* at 586 (emphasis added).

[29] *Id.* at 578.

"impossible to foresee," and "take care so to mould their regulations as to favor the candidates they wished to succeed."[30] Madison also worried that "inequality of the Representation in the Legislatures of particular States, would produce a like inequality in their representation" in Congress, as areas disproportionately empowered in the states would leverage their power to distort national elections as well.[31] Importantly, delegates arguing against Madison did not claim that such entrenchment was a state's right or somehow acceptable – rather, they countered that the greater fear was that Congress might abuse its power to entrench itself. Indeed, opponents of the Elections Clause argued that it could give Congress the ability to "perpetuate itself indefinitely by canceling elections," while supporters of the Clause argued it was necessary because state legislatures might do the same.[32] Francis Dana emphasized, meanwhile, that each state would be required to do more than simply send a full delegation to Congress – it also had to provide for elections where the people had an "equal influence."[33]

In short, Americans at the time of the Founding saw it as imperative that the electoral process be

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[30] *Id.* at 240.

[31] *Id.* at 240-41.

[32] PAULINE MAIER, RATIFICATION: THE PEOPLE DEBATE THE CONSTITUTION, 1787-1788, 173 (2010).

[33] *Id.* at 174.

protected against influences that might infringe upon their right to fair and equal representation,[34] particularly by those already in power.[35]

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[34] As Appellants and their *amici* point out, the Framers did not adopt a proportional representation system – a form of government that would have been alien to them – but that does not negate the importance the Framers placed on *equal representative rights*. Indeed, Appellants and their *amici* mistakenly rely upon sources which, correctly read, emphasize the importance of that very principle. For example, one brief relies heavily on Federalist 35, in which Alexander Hamilton argued against requiring "that all classes of citizens should have some of their number in the representative body." Legacy Foundation Br. 11-12, 35-36. The relevant (and important) point for this case, however, is that Hamilton argued against such a requirement on the ground that giving *voters* a free and equal choice was the best way to ensure that all classes were capably represented *and* that representatives would heed the views of *all* their constituents. *See* THE FEDERALIST NO. 35 (Alexander Hamilton). Indeed, Hamilton argued that "[t]his *dependence*, and the necessity of being bound himself, and his posterity, by the laws to which he gives his assent, are the true, and they are the strong chords of sympathy between the representative and the constituent." *Id.* (emphasis added). Partisan gerrymandering allows legislators to dramatically weaken, if not sever, this essential dependence by depriving voters of their representational rights.

[35] WOOD, *supra*, at 169.

C. The First Amendment Was Intended to Protect the Framers' Representative Ideals by Ensuring the People Could Hold Government Accountable

Since the Framers' time, the First Amendment has been closely intertwined with ideas of popular sovereignty and representation. The free exchange of ideas by members of the public and the right of voters to associate to advance their views, unhindered by government interference, are essential protections for actual representation. The First Amendment prohibits government actors from abusing their power to entrench themselves by creating barriers to the exercise of these rights.

The Framers saw free expression and debate as essential to a functioning democracy. For example, during consideration of the Constitution, Hamilton emphasized the close connection between free speech and political representation. In response to the claim of anti-Federalist writer "Brutus" that a republic could be sustained only in homogenous areas, Hamilton stressed that the "constant[] clashing of opinions" would sustain the republic because "differences of opinion, and the jarring of parties in [the legislative] department of the government . . . often promote deliberation and circumspection; and serve to check the excesses of the majority."[36] Unwarranted obstacles to "the jarring of parties" resulting from clashing opinions

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[36] CASS R. SUNSTEIN, WHY SOCIETIES NEED DISSENT 146 (2003) (quoting Hamilton).

run directly counter to this foundational understanding, particularly when such obstacles are imposed by a party in power whose excesses the "clashing of opinions" is meant to check.

In drafting and advocating for the Bill of Rights, Madison sought to assure an anxious public that the republican character of government would be protected from the abusive excesses of an empowered faction that might otherwise erode or destroy it. Observing that "a powerful interested party" would tend to abuse its authority "not less readily" than "a powerful and interested prince," he sought in drafting the Bill of Rights to declare "political truths" which, if accepted, would tend to "counteract the impulses of interest and passion."[37] Madison delivered a similar message to the First Congress when he proposed an initial draft of the Bill of Rights – including what would become the First Amendment – which he hoped would help prove the proponents of the Constitution "were as sincerely devoted to liberty and a republican government, as those who charged them with wishing the adoption of this constitution in order to lay the foundation of an aristocracy or despotism."[38]

In a republic defined by actual representation, expression and association related to voting are

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[37] Letter from James Madison to Thomas Jefferson (Oct. 17, 1788), *in* 11 THE PAPERS OF JAMES MADISON 11:297–300 (William T. Hutchinson et al. eds., 1962).

[38] James Madison, Speech in Congress on the Removal Power (June 8, 1789).

crucial. As Madison observed in discussing the right to free expression, "the right of electing the members of the Government constitutes more particularly the essence of a free and responsible government."[39] Those presently in power may not abridge First Amendment rights and thereby "derive an undue advantage for continuing themselves in it, which, *by impairing the right of election*, endangers the blessings of the Government founded on it."[40]

In this sense, the right of political expression and association, including through the vote, was an integral part of colonial Americans' transition from subjects of the Crown to citizens possessing "the absolute sovereignty"[41] and employing government officials as "their servants and agents,"[42] required to be "at all times accountable to them."[43] It was the device through which the people could express their voice – and have it heeded – regarding the issues of the day and the performance of the government.[44]

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[39] James Madison, *Report on the Virginia Resolutions* (Jan. 1800), *in* 5 THE WRITINGS OF JAMES MADISON 6:385-401 (Gaillard Hunt ed., 1900).

[40] *Id.* (emphasis added).

[41] *Id.*

[42] 4 DEBATES IN THE SEVERAL STATE CONVENTIONS ON THE ADOPTION OF THE FEDERAL CONSTITUTION 569-70 (J. Elliot ed., 1854) (James Iredell).

[43] PENNSYLVANIA AND THE FEDERAL CONSTITUTION 1787-1788, 250 (J. McMaster & F. Stone eds., 1888) (John Smilie).

[44] *See* WOOD, *supra*, at 164-65.

As one scholar has put it, "[t]he revolutionary intent of the First Amendment is . . . to deny to [the government] authority to abridge the freedom of the electoral power of the people."[45] Beyond being one of those expressive activities by which "We, the People" exercise our rights to self-government, the vote is "the official expression of a self-governing [citizen's] judgment on issues of public policy," and must be absolutely protected under the First Amendment.[46]

The Framers' recognition of the essential connection between the First Amendment and popular sovereignty is deeply rooted in this Court's jurisprudence. *See, e.g.*, *Ariz. Free Enter. Club's Freedom Club PAC v. Bennett*, 564 U.S. 721, 734 (2011) ("[T]he First Amendment has its fullest and most urgent application to speech uttered during a campaign for political office." (citation omitted)); *Citizens United v. Fed. Election Comm'n*, 558 U.S. 310, 339 (2010) ("Speech is an essential mechanism of democracy, for it is the means to hold officials accountable to the people."); *Stromberg v. California*, 283 U.S. 359, 369 (1931) ("A fundamental principle of our constitutional system" is the "maintenance of the opportunity for free political discussion *to the end* that government may be responsive to the will of the people." (emphasis added)). So, too, is the related recognition that "among our most precious freedoms" are "the right of individuals to associate

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[45] Alexander Meiklejohn, *The First Amendment is an Absolute*, 1961 SUP. CT. REV. 245, 254 (1961).

[46] *Id.* at 256.

for the advancement of political beliefs, and the right of qualified voters, regardless of their political persuasion, to cast their votes effectively." *Williams v. Rhodes*, 393 U.S. 23, 30 (1968). Consequently this Court has held, for example, that certain restrictions on ballot access violate the First Amendment by "discriminat[ing] against those candidates and – of particular importance – against those *voters* whose political preferences" do not align with the two major parties. *See Anderson v. Celebrezze*, 460 U.S. 780, 794 (1983). If those parties may not unfairly or unnecessarily burden the rights of voters not affiliated with them in the ballot-access context, it surely follows that neither party may do so in the context of partisan gerrymandering.

Mechanisms that effectively prevent translating popular will into actual representation by creating a structural impediment to the effective exercise of voters' rights – such as partisan gerrymandering – are directly contrary to the First Amendment value of political expression and accountability that the Framers recognized as the cornerstone of a vibrant democracy.

D. The Fourteenth Amendment Reflects the Framers' Vision of Democracy and Associational Rights and Extends it to the States

In the wake of the Civil War, the proponents of the Fourteenth Amendment emphasized the need to strengthen and vindicate the concept of actual representation premised on equal rights. Reconstruction-era Republicans argued vigorously

that the Framers' vision of a republic required equal representation of all citizens, and that this vision must prevail on the state level as well as the federal.[47] For example, in his famous "Equal Rights for All" speech, Senator Charles Sumner repeatedly invoked the Framers' rejection of "virtual representation"[48] and argued at length that "[t]he two ideas of Equality and a Right to Representation, so early and constantly avowed by the Fathers, are here again recognized as essential conditions of government; and this is the true definition of a Republic."[49] He and other Republican proponents of the Fourteenth Amendment cast the former slave states as aristocracies and oligarchies which must henceforth be required to respect the Framers' vision of representational rights.[50]

Representative John Bingham, perhaps the foremost champion of the Fourteenth Amendment,

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[47] Notably, President Lincoln had argued in his First Inaugural Address that "[a] majority held in restraint by constitutional checks and limitations, and *always changing easily with deliberate changes of popular opinions and sentiments*, is the only true sovereign of a free people" (emphasis added).

[48] *See* Charles Sumner, *The Equal Rights of All* (Feb. 5-6, 1866), *in* XIII CHARLES SUMNER: HIS COMPLETE WORKS 118, 159-60, 170-72 (2d ed. 1900).

[49] *Id.* at 184.

[50] *See, e.g.*, *id.* at 208-11; *see also* Charles O. Lerche, Jr., *Congressional Interpretations of the Guarantee of a Republican Form of Government During Reconstruction*, 15 J. OF SOUTHERN HIST. 192, 198 (1949).

likewise described the Amendment as a way to finish the Framers' work by securing their actual-representation vision on the state level now that the natural barrier to doing so – slavery – had been abolished:

> **What more could have been added** to that instrument **to secure the enforcement of these provisions of the bill of rights in every State, other than the additional grant of power which we ask this day? Nothing at all.** And I am perfectly confident that that grant of power would have been there but for the fact that its insertion in the Constitution would have been utterly incompatible with the existence of slavery in any State; for although slaves might not have been admitted to be citizens they must have been admitted to be persons. That is the only reason why it was not there.[51]

In sum, the Fourteenth Amendment advanced the Framers' vision of representation and, in transforming the federal government's relationship with the states, extended that vision to the state level as well. This Court has held that, in light of the Fourteenth Amendment, state-level partisan gerrymanders based on unequal population size are

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[51] John Bingham, One Country, One Constitution, and One People (Feb. 28, 1866).

unconstitutional. *See Reynolds*, 377 U.S. at 565-66. The same conclusion follows where the interference with actual representation – through partisan gerrymandering – is accomplished by other means.

II. PARTISAN GERRYMANDERING HAS BEEN FORCEFULLY DENOUNCED THROUGHOUT AMERICAN HISTORY AS AN UNCONSTITUTIONAL ABUSE OF POWER

Appellants and their *amici* place significant weight on various instances of partisan gerrymandering that have occurred in American history. But not only has partisan gerrymandering never been regarded as an acceptable part of our constitutional tradition, the practice has regularly met with severe condemnation and public opposition.

This Court has made clear that the use of a practice in American history, even on a widespread basis, does not blunt this Court's constitutional inquiry or immunize the practice. *See, e.g., INS v. Chadha*, 462 U.S. 919, 944 (1983). Moreover, the weight of historical practice for constitutional justification is especially doubtful if controversy has persisted regarding the very question of a practice's constitutionality. *See id.* at 942 n.13. Where partisan gerrymandering has occurred in American history, it has routinely been denounced as unconstitutional, dangerous to the republic, and a violation of citizens' prized right of representation. Indeed, many of the gerrymanders in American history – including some relied upon by Appellants in their brief – would already be held

unconstitutional today under the one-person, one-vote principle.

The first gerrymander in the American republic is generally thought to be Patrick Henry's attempt in 1788 to deny James Madison a congressional seat by grouping Madison's home county in a district with counties believed to be more favorable to Henry's anti-Federalist cause. Newspapers decried the scheme as a violation of the right of a free people to choose their representatives and a destruction of the majority's ability to decide.[52] The intense outrage with which the Founding generation greeted this scheme – even though it involved a contiguous and compact district of normal population – belies any claim that irregular district shapes were ever seen as essential to the impermissibility of gerrymandering.[53]

The practice received still greater attention, and renewed condemnation, when Elbridge Gerry signed the "notoriously outrageous" 1812 districting bill which would give gerrymandering its name.[54] Public outcry against Massachusetts Democratic-Republicans' aggressive gerrymander was immediate

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[52] ELMER C. GRIFFITH, THE RISE AND DEVELOPMENT OF THE GERRYMANDER 40-41 (1907).

[53] *See also id.* at 85-87 (discussing a controversial 1813 New Hampshire gerrymander in which districts were "but slightly modified," yet the effect was to divide the state "into districts in a most pronouncedly partisan manner").

[54] *Vieth*, 541 U.S. at 274-75 (plurality op.).

and fierce. The newspaper that published the famous political cartoon depicting the "Gerry-Mander" also decried it as a partisan violation of "the Rights of the People" and declared:

> This Law inflicted a grievous wound on the Constitution, – it in fact subverts and *changes our Form of Government*, which ceases to be *Republican* as long as an *Aristocratic* House of Lords under the form of a Senate tyrannizes over the People, and silences and stifles the voice of the *Majority*.[55]

One newspaper asked of the party leaders who advocated it, "Would not such persons as readily profit by rotten boroughs as ever any British minister did?"[56] Several counties issued resolutions denouncing the gerrymander, and towns sent remonstrances to the legislature denouncing it as unconstitutional and unjust.[57] Colonel John Flint argued it was a betrayal of the principle of representation for which "our country fought and bled."[58] Federalists decried it as a threat to the safety of republican institutions which contravened

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[55] *The Gerry-Mander, or Essex South District Formed into a Monster!*, SALEM GAZETTE, Apr. 2, 1813.

[56] GRIFFITH, *supra*, at 9 (citing *Senatorial Districts*, NEW ENGLAND PALLADIUM, May 19, 1812).

[57] *Id.* at 70-71.

[58] *Id.* at 71.

the Constitution and the Bill of Rights by usurping the majority's prerogative to govern.[59] Some even advocated attempts to remove the "gerrymander senators," or "senatorial usurpers," from the legislature by whatever means might be needed.[60]

For their part, Massachusetts Democratic-Republicans offered little defense of the gerrymander as meritorious or rightful. Some argued that previous districting laws in Massachusetts had been no different, and suggested that their opponents had previously engaged in gerrymandering, but those contentions were specious.[61] Others endeavored to deny the obvious partisan motivations for the scheme – whenever Democratic-Republicans in the Massachusetts House of Representatives appeared on the verge of admitting that there had been any such motivation, the Speaker called them to order.[62]

Later that decade, Massachusetts Federalists took control of the state legislature and – still viewing the 1812 gerrymander as a grave injustice, but evidently believing it justified their engaging in similar actions – passed a new gerrymander to favor their party.[63] The Democratic-Republicans promptly denounced the Federalists' gerrymander using

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[59] *Id.*

[60] *Id.*

[61] *Id.* at 63, 72.

[62] *Id.* at 72.

[63] *Id.* at 88.

virtually the same arguments leveled against their own, now claiming it was the Federalists who had effectively imported the English "rotten borough system."[64] A Democratic-Republican publication even attempted to answer the famous political cartoon depicting the "Gerrymander" with one depicting a "British Basilisk" of Federalist construction.[65]

Attempts at gerrymandering in other states were similarly met with condemnation. In New York, for example, Democratic-Republican gerrymanders were denounced as a violation of voters' rights, as disfranchisement, and as an effort "to preserve power in the hands of those who at present possess and abuse it."[66] In New Jersey, partisan gerrymanders by Federalists were likened to England's rotten boroughs,[67] decried as unpatriotic, and labeled by Democratic-Republicans as a "deadly poisoned arrow, levelled with certain aim at the inestimable right of suffrage."[68]

Despite continued widespread condemnation of partisan gerrymandering as an unconstitutional subversion of democracy and a threat to the republic, by 1840 the practice had come to be expected in some

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[64] *Id.* at 91.

[65] *Id.* at 89 (citing BOSTON PATRIOT, July 2, 1814).

[66] *Id.* at 58.

[67] *See id.* at 49.

[68] ZAGARRI, *supra*, at 117.

states.[69] As in Massachusetts, parties targeted by earlier gerrymanders took advantage of the practice when they regained the levers of power, whether out of sheer opportunism or a belief that unilateral disarmament would not do in the face of such entrenched partisan warfare.

This pattern continued through the Fourteenth Amendment era and beyond. As the nature of representation increasingly came to be viewed as a national concern in the post–Civil War era, the topic of gerrymandering increasingly was raised by federal officeholders. In 1870, future president James Garfield, then a congressman, acknowledged that he was a beneficiary of gerrymandering in Ohio which had given his Republican Party a fourteen-to-five advantage in the state's congressional delegation despite a roughly even partisan vote.[70] Garfield emphatically declared that "no man, whatever his politics, can justly defend a system that may in theory, and frequently does in practice,

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[69] *See* GRIFFITH, *supra*, at 11, 81.

[70] As Appellants note, the history of gerrymandering in Ohio began in 1842 with a Democratic scheme that was harshly denounced and ridiculed in the press; Whig representatives absconded to defeat a quorum on the proposal. Appellants Br. 8-9; *see also* WEEKLY OHIO ST. J. (Aug. 10, 1842) (denouncing the proposed gerrymander as a "stupendous scheme of iniquity and fraud" which disfranchised the majority, "so monstrous in its character as to be declared indefensible by those who voted for it"); *The Gerrymander*, Supplement, OHIO STAR, Feb. 22, 1854 (denouncing gerrymandering as "an invasion of the popular rights" which "strikes down the principle of government by majorities").

produce such results as these."[71] Recognizing that self-interested politicians would never solve the problem, Garfield pleaded for an institutional solution to what he called "the weak point in the theory of representative government, as now organized and administered" in the United States.[72] Other legislators of the time likewise condemned gerrymandering as legislative "usurpation" which decoupled the balance of power from popular voting behavior.[73]

President Benjamin Harrison similarly decried partisan gerrymandering as antithetical to American ideals. In his Third Annual Message in 1891, President Harrison denounced gerrymandering as a form of "political robbery" and called for it to be eliminated and "the right of the people to free and equal representation" secured. Indeed, although President Harrison observed that gerrymandering already was widely criticized, he pressed the critical importance of the issue:

> If I were called upon to declare wherein our chief national danger lies, I should

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[71] Statement of Rep. James A. Garfield, 41 Cong. Globe 4737, 41ST CONG. 2D SESS. – NO. 296 (June 23, 1870).

[72] *Id.*

[73] Peter H. Argersinger, *The Transformation of American Politics: Political Institutions and Public Policy, 1865-1910*, *in* CONTESTING DEMOCRACY: SUBSTANCE AND STRUCTURE IN AMERICAN POLITICAL HISTORY, 1775-2000, 117, 124 (Byron E. Shafer & Anthony J. Badger eds., 2001).

> say without hesitation in the overthrow of majority control by the suppression or perversion of the popular suffrage. That there is a real danger here all must agree; but the energies of those who see it have been chiefly expended in trying to fix responsibility upon the opposite party rather than in efforts to make such practices impossible by either party.[74]

President Harrison's message spoke to ongoing concern and outrage throughout the country at the continuing practice of gerrymandering. Newspapers in Northern states drew parallels between the post-Reconstruction disfranchisement of black citizens and the dilution of votes through partisan gerrymandering,[75] a practice that became widely derided as "virtual disfranchisement."[76] Midwestern

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[74] President Harrison's Third Annual Message (Dec. 9, 1891), *in* IX MESSAGES AND PAPERS OF THE PRESIDENTS 186, 208-11 (James D. Richardson ed., 1902).

[75] In a remarkable reverse mirror image of modern contentions that certain gerrymanders are enacted for reasons of party, not race, *see, e.g.*, *Cooper v. Harris*, 137 S. Ct. 1455 (2017), some proponents of gerrymanders in this era boldly claimed the opposite. *See, e.g.*, *Fruits of Democratic Usurpation*, THE INDIANAPOLIS J., Jan. 16, 1889 (arguing a Democratic reapportionment would enact "frauds" that, while "ostensibly aimed at the negroes, . . . embrace white Republicans as well, and amount to a practical extinction of Republican government").

[76] PETER H. ARGERSINGER, REPRESENTATION AND INEQUALITY IN LATE NINETEENTH-CENTURY AMERICA 19 (2012 ed.); *see, e.g.*, *(cont'd)*

Democrats indignantly asked, for example, "Is it any worse to disfranchise 50,000 people in South Carolina than 50,000 Democrats in Ohio?"[77] A newspaper in Indiana drew the analogy still more directly, arguing that the Democratic Party in that state was a minority party that "ha[d] its feet on the necks of the majority, and [had been] able, by a species of political burglary, to rob a large portion of the people of their rights as effectually as if they were absolutely excluded from the polls." The newspaper added ominously that "[m]en have gone to war to right wrongs less outrageous than this."[78] A West Virginia newspaper similarly decried the "monstrous injustice" of gerrymandering, through which it argued Democrats had been elected to Congress "partly due in many instances to an unfair and unequal arrangement of the congressional districts, and not to a desire of the people" to support them or their policies.[79] A Wisconsin newspaper

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Rebuke to Gerrymandering, WOOD COUNTY REPORTER, Mar. 31, 1892 (describing a Wisconsin gerrymander as "the worst case of virtual disfranchisement of the majority by a political trick").

[77] ARGERSINGER, *supra*, at 12.

[78] *Results of the Gerrymander*, INDIANAPOLIS J., Dec. 1, 1892; *see also* ARGERSINGER, *supra*, at 36-37 (2012 ed.) (noting contemporary comparisons between gerrymandering and voter suppression accomplished through physical intimidation and violence).

[79] *Results of the Gerrymander*, WHEELING DAILY INTELLIGENCER, Sept. 22, 1894.

editor, recognizing (as Garfield had) that his party had benefitted from a recent gerrymander, nevertheless urged some "solution [to] this very vexed question" of gerrymandering lest the principle of representative government be lost.[80]

Significantly, these concerns were not viewed at the time as presenting questions that were necessarily nonjusticiable or otherwise off-limits to courts. To the contrary, in rejecting on state-law grounds a gerrymander that – by drawing districts of unequal size and with boundaries designed for partisan ends – violated the right to "equal representation in the legislature," the Wisconsin Supreme Court declared:

> If the remedy for these great public wrongs cannot be found in this court, it exists nowhere. It would be idle and useless to recommit such an apportionment to the voluntary action of the body that made it. But it is sufficient that these questions are judicial and not legislative. The legislature that passed the act is not assailed by this proceeding, nor is the constitutional province of that equal and co-ordinate department of the government invaded. The law itself is the only object of judicial inquiry, and its constitutionality is the only question to be decided.

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[80] ARGERSINGER, *supra*, at 75.

State ex rel. Attorney Gen. v. Cunningham, 51 N.W. 724, 729-30 (Wis. 1892). Other state high courts likewise struck down gerrymandered districting schemes for their state legislatures. *See, e.g., Parker v. State ex rel. Powell*, 32 N.E. 836 (Ind. 1892). While these decisions rested on state law grounds, the opinions in these cases referred also to the equal-representation and anti-entrenchment principles of the federal Constitutional Convention in holding that courts had the right and the duty to decide the question of the gerrymanders' legality. *See, e.g., Cunningham*, 51 N.W. at 729-30 ("[T]his apportionment act violates and destroys one of the highest and most sacred rights and privileges of the people of this state, guarantied to them by the ordinance of 1787 and the constitution, and that is 'equal representation in the legislature.'"); *Parker*, 32 N.E. at 846 (Elliott, J. concurring) (observing that the Framers wisely provided for judicial checks against "the dangers of legislative usurpation of power").

Thus, while various instances of partisan gerrymandering have indeed occurred throughout American history, the practice has never been regarded as acceptable – or even widely defended – as part of our constitutional tradition or as a feature of democratic governance. To the contrary, from its inception to the present day, it has been harshly condemned as an unconstitutional mechanism for denying voters' essential rights to equal representation. One study of the history of gerrymandering, which Appellants cite repeatedly (Appellants Br. 6-9, 60-61), effectively summarized the historical view of the practice when it referred to

the gerrymander as "a species of fraud, deception, and trickery which menaces the perpetuity of the Republic of the United States," for it "sets aside the will of the popular majority."[81] For this reason alone, Appellants' attempt to rely on instances of gerrymandering in American history must fail.

Furthermore, Appellants' selective recounting of history (and that of their *amici*) also ignores a fundamental point: Until this Court's decisions recognizing the one-person, one-vote principle, many gerrymanders throughout American history included districts of unequal population size.[82] Indeed, uneven-population gerrymanders such as these, although less distortive than gerrymanders based on manipulation of district lines for partisan ends,[83]

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[81] GRIFFITH, *supra*, at 7.

[82] Several gerrymanders upon which Appellants rely in the opening section of their brief fall into this category. *See, e.g.*, Appellants Br. 6, 8-9; GRIFFITH, *supra*, at 43 (New York Federalist gerrymander in 1789); DAILY OHIO ST. J. (Aug. 12, 1842) (Ohio Democratic gerrymander in 1842); *see also* GRIFFITH, *supra*, at 50, 54, 80, 94 (discussing other early gerrymanders with unequal populations).

[83] *See, e.g.*, ERIK J. ENGSTROM, PARTISAN GERRYMANDERING AND THE CONSTRUCTION OF AMERICAN DEMOCRACY 150, 163 (2013) (analyzing House redistricting from 1840 to 1900, finding that "[t]he most important source of [partisan] bias was the distribution of voters into districts from gerrymandering, and less from malapportionment," and concluding that "[t]he current preoccupation of the courts with strict population equality ignores other – potentially just as harmful – forms of electoral manipulation").

had a history at least arguably more extensive.[84] Yet despite that historical record and the numerous complexities inherent in "enter[ing] this political thicket," *Colegrove v. Green*, 328 U.S. 549, 556 (1946), this Court in *Baker v. Carr*, 369 U.S. 186 (1962) ultimately "confronted this ingrained structural inequality" and ended the "[j]udicial abstention [that] left pervasive malapportionment unchecked." *Evenwel v. Abbott*, 136 S. Ct. 1120, 1123 (2016). The Court's recognition that unequal-population gerrymanders are unconstitutional and justiciable, and its ability in the decades since to decide such claims (as well as the racial gerrymandering claims it has consistently adjudicated) according to judicially manageable standards, "makes it particularly difficult to justify a categorical refusal to entertain claims against *this other type* of gerrymandering." *Vieth*, 541 U.S. at 310 (Kennedy, J., concurring in the judgment) (emphasis added).

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[84] Indeed, as a plurality of this Court has noted, gerrymandering based on unequal population size has been traced "back to the Colony of Pennsylvania at the beginning of the 18th century," when several counties conspired to limit the political power of the city of Philadelphia despite its growth. *Vieth*, 541 U.S. at 274 (plurality op.).

III. IN THE EXTREME FORM IT TAKES TODAY, PARTISAN GERRYMANDERING POSES A SEVERE THREAT TO AMERICAN IDEAS OF REPRESENTATION AND ASSOCIATIONAL RIGHTS

Extreme partisan gerrymanders today are distinct from gerrymanders of the past in ways that make them an ever more dangerous threat to the core constitutional value of actual representation. Today's extreme gerrymanders, facilitated by big data and sophisticated targeting technology, create the potential for *persistent entrenchment* – a powerful advantage persisting for multiple consecutive election cycles despite intervening shifts in public opinion – which would have been unimaginable to the Framers.

Gerrymanders in earlier periods of American history were often crude and ineffective as mechanisms of entrenchment. Gerrymanders built on county-level voting data were not particularly robust, and parties routinely miscalculated their relative levels of support.[85] These practical difficulties made partisan gerrymandering riskier

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[85] *See, e.g.*, ZAGARRI, *supra*, at 116-18 (discussing repeated miscalculations that hindered New Jersey Federalists' early attempts to gerrymander congressional districts). Likewise, in the late nineteenth century, the crude nature of the data and tools available for partisan gerrymandering created volatility that rendered partisan gerrymanders impermanent. *See, e.g.*, J. MORGAN KOUSSER, COLORBLIND INJUSTICE: MINORITY VOTING RIGHTS AND THE UNDOING OF THE SECOND RECONSTRUCTION 45, fig. 1.7 (1999).

and led some to believe it was "a self-limiting enterprise." *Davis v. Bandemer*, 478 U.S. 109, 152 (1986) (O'Connor, J., concurring in the judgment). Although a majority of this Court was skeptical that such practical difficulties actually limited partisan gerrymandering, *see id.* at 126 (majority opinion) ("It is not clear that political gerrymandering *is* a self-limiting enterprise . . . ."), there can be no doubt that the greater quantity and quality of demographic data available today allow parties to target voters more precisely and gauge their support more accurately. Current technology thus greatly reduces the risks and increases the potential gains to the majority party from this widely denounced practice.

Indeed, today, unlike in earlier eras, the nation faces what commentators have described as "the specter of elected officials and party officers using high-end technology and increasingly fine-grained data about voters to create maps that lock in their advantage and shut out opponents for years."[86] Studies show that extreme partisan gerrymanders are indeed becoming more effective and pernicious.[87] If partisan gerrymandering was ever a "self-limiting enterprise" held in check by the need to balance seat maximization and incumbent protection, these advances have obliterated the limits. Today's gerrymander technicians, "armed with modern

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[86] Jerry H. Goldfeder & Myrna Perez, *A Tale of (at Least) Two Gerrymanders*, N.Y. L. J. (June 22, 2017).

[87] *See, e.g.*, Nicholas O. Stephanopoulos & Eric M. McGhee, *Partisan Gerrymandering and the Efficiency Gap*, 82 U. CHI. L. REV. 831, 867 (2015).

geographical information systems," can "engineer so much advantage that it is possible to satisfy both of these goals."[88]

The gerrymander at issue in this case is a good example of this phenomenon. Using sophisticated software and a composite partisan score that their expert consultant affirmed was "almost a perfect proxy," the drafters of Act 43 added 12 safe or leaning Republican seats and reduced the number of "swing" districts from 19 to 10, such that Wisconsin Republicans would retain their majority even if the Democrats won every single swing district.[89] Election results show Act 43 has been even more effective than expected as a tool of entrenchment.[90]

A legislative coalition safe in the knowledge that it could lose every swing seat and yet maintain control of the legislature is not one that is accountable to the electorate as the Framers intended. When gerrymandering creates – as the district court found it had here – a "political system systematically unresponsive to a particular segment of the voters based on their political preference,"[91] it effectively defeats actual representation. Moreover,

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[88] ANTHONY J. MCGANN ET AL., GERRYMANDERING IN AMERICA 87 (2016).

[89] *Whitford v. Gill*, 218 F. Supp. 3d 837, 850, 891 (W.D. Wis. 2016).

[90] *Id.* at 901.

[91] *Id.* at 887 n.170.

the durable nature of today's extreme partisan gerrymandering means it is exceptionally difficult or impossible for disadvantaged voters to remedy their constitutional injury through the political process. When the party in power can entrench itself under "any likely future electoral scenario for the remainder of the decade," as the district court found here,[92] it entrenches itself throughout the decennial redistricting cycle and controls the tools of entrenchment for the next one too.[93] Just as radically malapportioned state legislatures persisted without a political solution before this Court intervened, *see Evenwel*, 136 S. Ct. at 1123, so does today's extreme partisan gerrymandering raise the risk that voters targeted by the practice will "complain from generation to generation without redress."[94]

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[92] *Id.* at 896.

[93] The Framers would no doubt be especially perplexed by the argument, advanced by the dissent below, that the opposition party may vindicate its rights by electing a governor. *See id.* at 936 (Griesbach, J., dissenting). The American conception of representative democracy since the Framers' time has viewed the legislature as the primary locus of representation. *See, e.g.*, WOOD, *supra*, at 163 ("The real importance of the legislatures came from their being the constitutional repository of the democratic element of the society or, in other words, the people themselves."). The representational rights of opposition party voters are protected by the Constitution, *see, e.g.*, *Reynolds*, 377 U.S. at 566, not dependent on the election of a governor at a fortuitous time in the decennial redistricting cycle.

[94] RECORDS at 578 (Mason).

These concerns are further heightened by the recent emergence of coordinated gerrymandering campaigns to systematically diminish the representational and associational rights of members of a disfavored party across multiple states. Such efforts also would have been unthinkable to the Framers, who relied on the diversity of interests and views throughout the states to naturally check the development of a powerful national faction.[95] But in 2010, for example, a multi-state campaign called "REDMAP" sought to install a voter-proof "firewall" that could deliver Republican legislative majorities throughout the decennial redistricting cycle.[96] National political operatives launched this campaign explicitly with an eye to controlling not only the state legislatures, but also the congressional districts those legislatures would draw.[97] To be sure, Democrats engaged in

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[95] *See, e.g.*, THE FEDERALIST NO. 10 (James Madison), NO. 61 (Alexander Hamilton). The Framers feared that a faction able to consolidate power could infringe other citizens' rights. *See, e.g.*, RECORDS at 134 (Madison warning that "republican liberty" is constantly at risk of oppression by a majority faction).

[96] REPUBLICAN STATE LEADERSHIP COMMITTEE, REDMAP: HOW A STRATEGY OF TARGETING STATE LEGISLATIVE RACES IN 2010 LED TO A REPUBLICAN U.S. HOUSE MAJORITY IN 2013 (Jan 4., 2013), http://bit.ly/1NlDJZr (explaining that by "[c]ontrolling the redistricting process" in key states, the GOP could "maintain a Republican stronghold in the U.S. House of Representatives *for the next decade*." (emphasis added)).

[97] *See id.*; Karl Rove, *The GOP Targets State Legislatures*, WALL ST. J., Mar. 4, 2010 ("He who controls redistricting can control Congress.").

similar behavior where they had the opportunity.[98] Moreover, the success of the nationwide Republican initiative in 2010 has already sparked a Democratic "BLUEMAP" effort to capture state legislatures and engineer congressional districts in the 2020 redistricting cycle.[99] This elevation of gerrymandering efforts to coordinated campaigns on the national level indicates that the natural check the Framers relied upon has been greatly eroded or destroyed, and thus further heightens the risk of an entrenched faction consolidating and abusing its power.

The greater potential for entrenchment that is achievable today through sophisticated technology means that partisan gerrymandering enacts a higher toll on voters' associational rights than the gerrymanders of prior eras in at least two ways. First, by using more, and more detailed, data sources, government actors can identify with greater precision than ever before those voters who express political views or hold political affiliations with which those in power disagree – that is, those voters whose First Amendment rights the government wishes to burden based on their viewpoint.

Second, by drawing district lines with ever greater precision, those in power can ensure the burden on those voters' rights is as great as possible

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[98] *See, e.g.*, Dave Daley, *How Democrats Gerrymandered Their Way to Victory in Maryland*, THE ATLANTIC, June 25, 2017.

[99] *See id.*

– in other words, that their vote means as little as possible. *Amici* respectfully submit that the Court should not ignore these developments, which are likely to raise ever greater concerns as technology advances. In another context, this Court has taken into account the ability of increasingly sophisticated technologies "already in use or in development" to increase, as a practical matter, the government's ability to intrude on a citizen's Fourth Amendment rights, lest a rigid rule leave homeowners "at the mercy of advancing technology." *Kyllo v. United States*, 533 U.S. 27, 35-36 (2001). Similarly here, the Court should consider the greater First Amendment burdens the government may impose using advanced technology in the gerrymandering context.

* * *

The extreme partisan gerrymandering practiced today in Wisconsin is just the sort of abuse the Framers worried those in power might engage in, at the expense of protected rights of representation and association. If this Court does not act and extreme partisan gerrymandering continues to exist and expand unchecked, legislative assemblies will cease to "be bodies which are collectively responsive to the popular will." *Reynolds*, 377 U.S. at 565. The constitutional right of each citizen to "an equally effective voice in the election of members of his state legislature" would be illusory, a transparent and cruel legal fiction. *Id.*

CONCLUSION

For the foregoing reasons, *amici* respectfully urge this Court to affirm the decision below.

Respectfully submitted,

CLIFFORD M. SLOAN
Counsel of Record
BRENDAN B. GANTS
SKADDEN, ARPS, SLATE
MEAGHER & FLOM LLP
1440 New York Ave., NW
Washington, DC 20005
(202) 371-7000
cliff.sloan@skadden.com

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APPENDIX

APPENDIX

Peter H. Argersinger is Professor of History at Southern Illinois University. His teaching and scholarship focus on American political history, with particular expertise in redistricting in the mid-nineteenth and early twentieth centuries. He is the author or co-author of six books, including REPRESENTATION AND INEQUALITY IN LATE-NINETEENTH CENTURY AMERICA: THE POLITICS OF APPORTIONMENT (2012) and STRUCTURE, PROCESS AND PARTY: ESSAYS IN AMERICAN POLITICAL HISTORY (1991).

Carol Berkin is Presidential Professor of History, Emerita, at Baruch College and the Graduate Center of the City University of New York. She is a specialist in American colonial and revolutionary history, and her numerous writings include A BRILLIANT SOLUTION: INVENTING THE AMERICAN CONSTITUTION (2001).

Holly Brewer is the Burke Professor of American History at the University of Maryland. She is a specialist in early American history and the early British empire, with a particular focus on early modern debates about justice. Her published works include BY BIRTH OR CONSENT: CHILDREN, LAW, AND THE ANGLO-AMERICAN REVOLUTION IN AUTHORITY (2005), which received, among other awards, the Biennial Book Prize of the Order of the Coif from the American Association of Law Schools.

John Brooke is Arts & Sciences Distinguished Professor of History and Director of the Center for

Historical Research at Ohio State University. His major field of professional interest is American political and social history from 1660 to 1860. His published works include THE HEART OF THE COMMONWEALTH: SOCIETY AND POLITICAL CULTURE IN WORCESTER COUNTY MASSACHUSETTS, 1713-1861 (1989), COLUMBIA RISING: CIVIL LIFE ON THE UPPER HUDSON FROM THE REVOLUTION TO THE AGE OF JACKSON (2010), and *"To be Read by the Whole People": Press, Party, and Public Sphere in the United States*, 1789-1840, *in* PROCEEDING OF THE AMERICAN ANTIQUARIAN SOCIETY 110 (2000).

Saul Cornell is the Paul and Diane Guenther Chair in American History at Fordham University and a specialist in early American constitutional thought. Among other published works, he is the author of THE OTHER FOUNDERS: ANTI-FEDERALISM AND THE DISSENTING TRADITION IN AMERICA, 1788-1828 (1999); co-author of VISIONS OF AMERICA: A HISTORY OF THE UNITED STATES (3d ed. 2017); and co-author, with Gerald F. Leonard, of *The Consolidation of the Early Federal System*, *in* THE CAMBRIDGE HISTORY OF LAW IN AMERICA (Christopher Tomlins & Michael Grossberg eds. 2008).

Joanne B. Freeman is Professor of History and American Studies at Yale University. She specializes in early American history, with a particular focus on politics and political culture. Her published works include AFFAIRS OF HONOR: NATIONAL POLITICS IN THE NEW REPUBLIC (2001), which won the Best Book Award from the Society of Historians of the Early American Republic. She is

also the author of numerous scholarly articles on electoral politics in American history and the editor of ALEXANDER HAMILTON: WRITINGS (LIBRARY OF AMERICA) (2001) and THE ESSENTIAL HAMILTON: LETTERS & OTHER WRITINGS (2017).

Jonathan Gienapp is Assistant Professor of History at Stanford University. Principally a scholar of Revolutionary and early republican America, he has focused especially on the period's political culture, constitutionalism, and intellectual history. His forthcoming book, FIXING THE CONSTITUTION: THE TRANSFORMATION OF CONSTITUTIONAL IMAGINATION AT THE AMERICAN FOUNDING (Harvard University Press), explores how and why founding-era Americans' understanding of the Constitution transformed in the early years of the republic. He has written widely on the relationship between historical practice and constitutional originalism and is currently working on a large project exploring how Americans' understanding of "democracy" evolved in the late eighteenth and early nineteenth centuries.

Hendrik Hartog is the Class of 1921 Bicentennial Professor in the History of American Law and Liberty and Director of the Program in American Studies at Princeton University. His scholarly work focuses on the social history of American law, including the history of constitutional rights claims and the historiography of legal change. Among other published works, he is the author of *The Constitution of Aspiration and "The Rights that Belong to Us All,"* 74 J. AM. HIST. 1013 (1987), and editor of LAW IN THE AMERICAN REVOLUTION AND THE REVOLUTION IN THE LAW (1981).

Alexander Keyssar, the Matthew W. Stirling, Jr. Professor of History and Social Policy at Harvard University, specializes in historical issues with contemporary policy implications. In addition to other books, he is the co-author of INVENTING AMERICA: A HISTORY OF THE UNITED STATES (2003) and the author of THE RIGHT TO VOTE: THE CONTESTED HISTORY OF DEMOCRACY IN THE UNITED STATES (2d ed. 2009), which received, among other awards, the Beveridge Prize of the American Historical Association for the best book in U.S. history.

James T. Kloppenberg is the Charles Warren Professor of American History at Harvard University. He has written extensively about American politics and ideas from the seventeenth century to the present. His most recent book is TOWARD DEMOCRACY: THE STRUGGLE FOR SELF-RULE IN EUROPEAN AND AMERICAN THOUGHT (2016), which explores democracy from the perspective of the Framers and others who struggled to envision and achieve it.

Gerald F. Leonard is Professor of Law and Law Alumni Scholar at the Boston University School of Law. He is a historian of American constitutionalism and politics whose books include THE INVENTION OF PARTY POLITICS: FEDERALISM, POPULAR SOVEREIGNTY, AND CONSTITUTIONAL DEVELOPMENT IN JACKSONIAN ILLINOIS (2002). He is the co-author, with Saul Cornell, of *The Consolidation of the Early Federal System*, *in* THE CAMBRIDGE HISTORY OF LAW IN AMERICA

(Christopher Tomlins & Michael Grossberg eds. 2008).

Peter S. Onuf is the Thomas Jefferson Memorial Foundation Professor Emeritus in the Corcoran Department of History at the University of Virginia and Senior Research Fellow at the Robert H. Smith International Center for Jefferson Studies at Monticello. He specializes in the history of the early American republic and has published numerous books on the topic, including THE ORIGINS OF THE FEDERAL REPUBLIC (1983), JEFFERSON'S EMPIRE: THE LANGUAGE OF AMERICAN NATIONHOOD (2000), and THE MIND OF THOMAS JEFFERSON (2007). He was elected to the American Academy of Arts and Sciences in 2014.

Jack Rakove is the William Robertson Coe Professor of History and American Studies, and Professor of Political Science, at Stanford University. His principal areas of research focus on the origins of the American Revolution and Constitution, the political career and thinking of James Madison, and the role of historical knowledge in constitutional interpretation. He is the author of seven books, including ORIGINAL MEANINGS: POLITICS AND IDEAS IN THE MAKING OF THE CONSTITUTION (1996), which won the Pulitzer Prize in History; THE ANNOTATED U.S. CONSTITUTION AND DECLARATION OF INDEPENDENCE (2009); and REVOLUTIONARIES: A NEW HISTORY OF THE INVENTION OF AMERICA (2010). He is a member of the American Philosophical Society.

John Fabian Witt is the Allen H. Duffy Class of 1960 Professor of Law and Professor of History at Yale University. Much of his scholarship focuses on the historical development of American law in the early republic and the Civil War era. His books include PATRIOTS AND COSMOPOLITANS: HIDDEN HISTORIES OF AMERICAN LAW (2007), and LINCOLN'S CODE: THE LAWS OF WAR IN AMERICAN HISTORY (2012), which was awarded the Bancroft Prize.

Rosemarie Zagarri is University Professor and Professor of History at George Mason University. She is a specialist in early American history with a particular interest in apportionment and districting. In 2009-2010 she was President of the Society for Historians of the Early American Republic. Her published works include THE POLITICS OF SIZE: POLITICAL REPRESENTATION IN THE UNITED STATES, 1776-1850 (1987); A WOMAN'S DILEMMA: MERCY OTIS WARREN AND THE AMERICAN REVOLUTION (1995); and REVOLUTIONARY BACKLASH: WOMEN AND POLITICS IN THE EARLY AMERICAN REPUBLIC (2007), as well as numerous scholarly articles.